STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 4, 2002
v JOSHUA ALLEN MCDONALD, Defendant-Appellee.	No. 233812 Oakland Circuit Court LC No. 00-174377-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v CHRISTOPHER MCDONALD, Defendant-Appellee.	No. 234143 Oakland Circuit Court LC No. 00-174634-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. I would hold that pursuant to the search incident to an arrest exception, the search without a warrant of the jacket and seizure of the marijuana did not violate defendants' constitutional guarantees against unreasonable searches and seizures. US Const, Am IV and Am XIV and Const 1963, art 1, § 11.

I

Defendants Joshua Allen McDonald and Christopher McDonald became the focus of a police investigation following a report of a breaking and entering and the theft of a handgun. The complainant speculated that defendants were the perpetrators of the crimes, although little, if any, evidence supported the complainant's conclusion.

After receiving the complaint, Michigan State Police Trooper Trevor Radke and two other officers visited a residence in which the defendants were staying. The three officers entered the house with the permission of the owner or lessee, but without her express consent to

search. Defendants Joshua McDonald and Christopher McDonald along with Duane Jensen were found sleeping in a small (approximately ten by fifteen feet) living room. Defendant Joshua McDonald was sleeping on a recliner chair located approximately three feet from a wall-mounted coat rack on which three jackets were hung. After awaking the three men, Trooper Radke arrested and handcuffed defendant Joshua McDonald in the execution of a warrant for his arrest for escape. The three men were then questioned regarding their knowledge, if any, of the reported breaking and entering and the theft of the handgun. Immediately before transporting defendant Joshua McDonald to a patrol car, Trooper Radke performed a "pat and crush" search of the three jackets that were hung approximately three feet from the location where defendant Joshua McDonald had been arrested. During the patdown, Trooper Radke felt a hard object in one of the jackets. Because the trooper thought the object might be the stolen handgun or some other weapon, he retrieved the object and discovered it to be a compressed brick of marijuana. At the police station, defendant Joshua McDonald allegedly confessed that he and his brother broke into the victim's residence for the purpose of stealing the marijuana. Further, it was defendants' intent to sell the marijuana "to get money to purchase Christmas presents." The stolen handgun was later recovered in the house where defendants were staying.

In the lower court, defendants successfully moved to suppress the marijuana evidence on the basis that its search and seizure violated their constitutional guarantees to be free from unreasonable searches and seizures.[1]

On appeal, the people argue that the circuit court erred in suppressing the evidence because the search and seizure without a warrant was constitutionally permissible pursuant to the search incident to an arrest exception.[2] I agree.

II

We review de novo a trial court's ultimate decision on a motion to suppress. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999); *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). However, the trial court's underlying findings of fact are reviewed for clear error. *Echavarria, supra* at 366; *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

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[1] It is not clear from defendants' motions whether they relied on the constitutional guarantees of both the United States and Michigan Constitutions.

[2] On appeal, the prosecution has not raised the issue whether the search of the jacket was constitutionally permissible as a limited protected search necessary for the safety of the police officers. See *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997), and *People v Beuschlein*, 245 Mich App 744, 757-758; 630 NW2d 921 (2001). Because in our adversarial system appellate courts should normally consider only those issues that are properly preserved, raised, and argued, *People v Viano*, 467 Mich 856; ___ NW2d ___ (2002), and *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), I express no opinion regarding whether the search and seizure would also be authorized pursuant to the warrant exception for limited protected searches.

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV and Am XIV and Const 1963, art 1, § 11.[3] The lawfulness of a search or seizure depends on its reasonableness. *Illinois v McArthur*, 531 US 326; 121 S Ct 946; 148 L Ed 2d 838 (2001); *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). As a general rule, searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless the police conduct falls under one of the established exceptions to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999); *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993); *Snider, supra* at 407.

III

In the present appeal, the people argue that the lower court erred in refusing to apply the search incident to an arrest exception. In *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996), our Court summarized this warrant exception as follows:

> One of the exceptions to the warrant requirement is a search incident to an arrest. *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). This exception is justified by the fact that, when a person is taken into official custody, it is reasonable to search for weapons, instruments of escape, and evidence of crime. *United States v Edwards*, 415 US 800, 802-803; 94 S Ct 1234; 39 L Ed 2d 771 (1974), citing *United States v Robinson*, 414 US 218, 235; 94 S Ct 467; 38 L Ed 2d 427 (1973). Undergirding this exception is the requirement that there must be a lawful arrest in order to establish the authority to search. *Id*.; *People v Crawford*, 202 Mich App 537, 538-539; 509 NW2d 519 (1993). The scope of the search must be strictly tied to, and justified by, the circumstances that rendered its initiation permissible. *United States v Fleming*, 677 F2d 602, 607 (CA 7, 1982), citing *New York v Belton*, 453 US 454, 457; 101 S Ct 2860; 69 L Ed 2d 768 (1981), citing *Chimel, supra* at 762. Further, in operation, this exception allows an arresting officer to search the area within the arrestee's immediate reach for weapons or evidence. *Id.* at 763. *United States v Brown*, 217 US App DC 79, 81; 671 F2d 585 (1982); *United States v Turner*, 926 F2d 883, 887 (CA 9, 1991), cert den 502 US 830 (1991). Such a search may occur at the place of arrest or at the place of detention and before the defendant is advised of the right to post bail. *Crawford, supra*, at 538-539.

Defendants argue that the search incident to an arrest exception is inapplicable in the present case because after defendant Joshua McDonald was arrested and handcuffed, he was "held outside of arm's length of where the jackets were found and searched." In response, the prosecutor asserts that defendants' interpretation of the search incident to an arrest exception is too restrictive. The people emphasize that the living room in which defendant Joshua McDonald was arrested was extremely small (approximately ten by fifteen feet) and Joshua was arrested

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[3] In regard to the present search and seizure that occurred inside the curtilage of a dwelling house, absent compelling reasons, the Michigan and federal constitutional guarantees are coextensive. *Sitz v Dep't of State Police*, 443 Mich 744, 750-763; 506 NW2d 209 (1993).

only three feet away from the jackets that were searched. According to the prosecution's interpretation of the exception, the jackets were within the area that was "within the immediate control" of the arrestee. I agree with the prosecution.

In *Chimel, supra*, the United States Supreme Court overruled prior authority by holding that the search incident to arrest exception is limited to the area "within the immediate control" of the arrestee. The rationales for this warrant exception were the safety of the arresting officer and the prevention of destruction of evidence. *People v Eaton,* 241 Mich App 459, 462; 617 NW2d 363 (2000).

Later in *New York v Belton, supra*, the Supreme Court clarified that the search incident to an arrest exception is a rule of law that does not rise or fall on the factual likelihood, in any particular case, that a defendant might grab a weapon or destroy evidence.[4] Searches and seizures within the definition of an established exception are reasonable as a matter of law because "a single, familiar standard" is necessary "to regulate the police in their day-to-day activities." *Id.*, quoting with approval LaFave, "Case-by-Case Adjudication" v "Standardized Procedures": *The Robinson Dilemma,* 1974 S Ct Rev 127, 141, and *Dunaway v New York,* 442 US 200, 213-214; 99 S Ct 2248, 2256-2257; 60 L Ed 2d 824 (1979). In this regard, the Supreme Court in *Belton, supra* at 459, applied and quoted with approval *United States v Robinson, supra*:

> "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." [*Robinson*] at 235; 94 S Ct at 477. In so holding, the Court rejected the suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Ibid.*

See also *Eaton, supra* at 462. ("A search incident to an arrest is a reasonable search and, therefore, permitted by the Fourth Amendment, even though the police do not have a search warrant.")

Like the present case, *Belton* involved a search of a jacket, which the prosecution sought to justify pursuant to the search incident to an arrest exception. In *Belton*, the defendant was arrested for possession of marijuana after the police smelled burnt marijuana emanating from the defendant's vehicle. The defendant was ordered out of his vehicle, patted down, and arrested. Thereafter, the police searched the backseat of the defendant's vehicle and discovered a black leather jacket. The police unzipped one of the pockets of the jacket in which they found cocaine. In the trial court, the defendant moved to suppress the cocaine on the basis that it was discovered as a consequence of an unlawful search and seizure. The United States Supreme Court

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[4] The majority in their analysis errs in this regard. The factual finding that after Joshua's arrest it was unlikely he would reach for a weapon or destroy evidence is immaterial to the legal determination whether the jacket was within the arrestee's immediate control at the time of his arrest. I would hold, as a matter of law, that personal property within three feet of an arrestee is within his immediate control.

disagreed, holding that the jacket was lawfully searched because it had been "within the arrestee's immediate control" "just before he was arrested."[5] The Supreme Court explained:

> It is not questioned that the respondent was the subject of a lawful custodial arrest on a charge of possessing marijuana. The search of the respondent's jacket followed immediately upon that arrest. The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments. Accordingly, the judgment is reversed. [*Id.* at 462.]

The present case is similar to *Belton* because the jacket that was searched was within three feet of defendant Joshua McDonald at the time he was arrested and therefore within his immediate control. *United States v Fleming, supra; United States v Tavolacci*, 704 F Supp 246 (DC, 1988). See also *United States v Cotnam*, 88 F3d 487, 496 (CA 7, 1996). ("In the case of such a small motel room, the officers could lawfully search the room and check under the bed for persons or weapons as part of a search incident to arrest . . . [The police] were entitled to pat down the defendant's jacket, which was laying on the bed next to where the defendant standing, for weapons.") (citation omitted); *Commonwealth of Pennsylvania v Wheatley*, 266 Pa Super 1, 6-7; 402 A2d 1047 (1979) (Search of defendant's jacket found hanging on a chair in the room in which the defendant was arrested was held to be within the arrestee's immediate control.); *Maine v LeBlanc*, 347 A2d 590, 594 (Me, 1975) (A jacket found eight to ten feet from where defendant was arrested held to be within the arrestee's immediate control at the time of his arrest. "A search incident to a lawful arrest must be limited to the area *where the arrest occurred*.") (emphasis added.) Based on the above authorities, I conclude that the circuit court committed error requiring reversal by suppressing the evidence and dismissing the charges against defendants.

I would reverse and remand for further proceedings.

/s/ Richard Allen Griffin

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[5] As noted by Justice (now Chief Justice) Rehnquist in his concurring opinion, *Belton* was decided on the basis of *Chimel, supra*, rather than under the "automobile exception." See also *Eaton, supra;* cf. *People v Carter*, 250 Mich App 510; ___ NW2d ___ (2002).